No. 94-1045

JAN 9 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOHN RAMBO AND METROPOLITAN STEVEDORE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent John Rambo argues (Br. in Opp. 3) that if disability awards may be modified absent a change in the claimant's physical condition, "every claim for compensation for a nonscheduled award will inspire multiple petitions by each party based upon changes in the business cycle." That contention is without merit. The administrative law judge (ALJ) in this case recognized that "higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. One has to consider wage-earning capacity in an open labor market under normal employment conditions." Pet. App. 13a (citation omitted). In concluding that Rambo no

longer suffered a loss of wage-earning capacity, the ALJ noted that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that Rambo was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 14a-15a. The Benefits Review Board noted that Rambo had completed vocational training (*id.* at 6a) and rejected his contention that the absence of any change in his physical condition precluded modification. *Id.* at 8a. It went on to note that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Ibid.*

Thus, nothing in the decision of the ALJ or the Board suggests that modification under 33 U.S.C. 922 follows automatically from a finding that the claimant's actual wages have increased. Rather, the ALJ and the Board simply concluded that an individual's wage-earning capacity may increase even though his physical condition remains unchanged, and that such an increase in wage-earning capacity constitutes a "change in conditions" supporting modification under Section 922. The court of appeals, by contrast, held that an increase in a claimant's wage-earning capacity can never provide a basis for modification unless it involves a change in the claimant's physical condition. See Pet. App. 2a ("a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification").

2. Rambo contends (Pet. i) that he was told by his employer's attorney that if he accepted his initial

disability award, it would be paid for life. Rambo, whose own attorney was present at this alleged conversation (C.A. E.R. 56-57), presented this allegation as part of his argument to the Board that the employer should be estopped from withdrawing from a supposed "settlement." Pet. for Rev. 5-7 (Ben. Rev. Bd. No. 91-1538). The ALJ and the Board both rejected Rambo's contention that modification was inappropriate because the award had been obtained pursuant to a "settlement." Pet. App. 11a-12a, 7a-8a. The court of appeals did not address that claim. If this Court grants the petition for a writ of certiorari and reverses the judgment of the Ninth Circuit, it will be open to the court of appeals on remand to decide whether Rambo remains free to oppose modification on that ground. The mere possibility that Rambo might ultimately obtain relief on that alternative ground, however, should not prevent this Court from reviewing the erroneous legal ruling of the court of appeals, which squarely conflicts with the Fourth Circuit's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (1985).

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1995